(3)

No. 90-448

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FORD MOTOR COMPANY, ET AL.,
PETITIONERS

v.

CHRISTINE MAHNE,
RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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12

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Our petition demonstrated that the Sixth Circuit's decision disregards this Court's pronouncements under *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), for determining issues of state law in diversity cases. Thus, the court of appeals (a) declined to follow the rulings of state intermediate appellate courts, (b) declined to grant any deference to the district court's construction of state law, and (c) declined to take advantage of available state court certification procedures. Not surprisingly, the Sixth Circuit's flawed methodology produced an interpretation of both Michigan and Florida law that cannot possibly be reconciled with controlling authority in those states. As a consequence, "a suit by a non-resident litigant in [Michigan] federal court instead of in a State court a block away [will] lead to a substantially different result." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945).

Respondent endeavors to mask these defects in the court of appeals' decision by blithely asserting (Br. in Opp. 4) that—despite the district court's ruling against her—this case "involves nothing more than an application of settled principles of state law in a diversity case." She contends that the Sixth Circuit reached the right result under Michigan and Florida law and that any argument to the contrary is "desperate" (Br. in Opp. 5), "ludicrous" (*id.* at 8), "arrogan[t]" (*id.* at 10), and "preposterous" (*id.* at 11). But in addition to being incorrect, respondent's focus on state law misses the point of our petition: the Sixth Circuit misinterpreted the law of two states *because of* its fundamental misapplication of *Erie*'s precepts, which were designed to avoid just such a patently erroneous determination of state law. Accordingly, this case warrants review not because the Sixth Circuit misconstrued state law, which it plainly did, but because it rejected every

tool that this Court has identified for federal court determinations of state law.[1]

Respondent's brief in opposition is significant, moreover, as much for what it does not say as for what it does. As we explained in the petition (at 3-4), this case was filed (and dismissed) in Michigan state court and Florida state court before respondent finally found a forum that agreed with her interpretation of state law. Remarkably, respondent does not deny that this case is an example of blatant forum shopping, much less make any effort to justify her course of conduct. Nor does she dispute the practical importance of the correct determination by federal courts of state choice-of-law rules in general—or of Michigan choice-of-law rules in particular—in tort cases brought under diversity jurisdiction. See Pet. 25-28. Try as she might, respondent's attempts to mischaracterize our position and to downplay the significance of the court of appeals' ruling cannot obscure the fact that the anomalous result in this case gives diversity plaintiffs license to file suit in federal court whenever they believe that the state court would be hostile to their claims.

I. THE COURT OF APPEALS IGNORED CONTROLLING STATE-COURT DECISIONS

As respondent concedes (Br. in Opp. 7), federal courts sitting in diversity are required to follow intermediate state appellate decisions unless there is convincing evidence that the state's highest court would rule to the con-

[1] The ongoing proceedings in the district court (Br. in Opp. 2) are irrelevant to the issues raised in the petition. In the event that this Court grants certiorari or holds the petition pending a decision in *Salve Regina College* v. *Russell*, cert. granted, No. 89-1629, the district court undoubtedly would postpone further proceedings in the case in order to avoid a trial that would be completely unnecessary if the Court agrees with Ford's submission.

trary. Nonetheless, the court of appeals expressly refused to follow the decision in *Hampshire* v. *Ford Motor Co.*, 399 N.W.2d 36 (Mich. App. 1986), lv. denied, 428 Mich. 852 (1987), even though, as the district court remarked, it "presented virtually an identical set of facts" (Pet. App. 14a).

Respondent's various excuses for the Sixth Circuit's rejection of *Hampshire* cannot withstand analysis. First, contrary to respondent's assertion that *Hampshire* is "factually distinguishable" (Br. in Opp. 5-7), *Hampshire* in fact arose in circumstances essentially identical to this case: both involved defective design claims brought against Ford by plaintiffs who lived outside Michigan and who were injured in their home states in accidents in which the other drivers also lived in the same states. See Pet. 12-13.[2]

Respondent next asserts (Br. in Opp. 7) that the Michigan Supreme Court's decision in *Olmstead* v. *Anderson*, 400 N.W.2d 292 (1987), "superseded all pre-*Olmstead* decisions," including *Hampshire*. This excuse is pure fiction. As respondent acknowledges (Br. in Opp. 3), *Olmstead* applied an "interest analysis" for choice-of-law questions, which involves a consideration of "the interest of each state." That is exactly what the *Hampshire* court did (399 N.W.2d at 38), relying on the interest-weighing approach set forth in the appellate court's decision in *Olmstead* (377 N.W.2d 853 (Mich. App. 1985)), which the Michigan Supreme Court affirmed. Indeed, *Olmstead* expressly endorsed *Hampshire*, referring to it as one of the recent

[2] The fact that in *Hampshire* the plaintiff did not object initially to the application of California law (Br. in Opp. 6-7 n.5) was not the basis for the Michigan court's holding. Rather, the court's ruling that California law applied was based on "a comparison of the interests of each jurisdiction in having its law govern the case." *Hampshire*, 399 N.W.2d at 38.

"interest-weighing cases" that was the "majority" position "as well as the trend." 400 N.W.2d at 301-302. And subsequent decisions in Michigan have uniformly treated *Hampshire* as authoritative precedent on choice-of-law rules—a line of cases that respondent simply ignores. See Pet. 13 & n.5. Thus, state law is flatly inconsistent with respondent's unsupported assertion that *Olmstead* "superseded" *Hampshire* and all other prior precedent on Michigan choice-of-law rules.[3]

The Sixth Circuit's violation of controlling *Erie* principles also led to its inexplicable misreading of Florida law. The court of appeals' conclusion that Michigan law applied to this case—rather than the law of Florida, where the accident occurred, the individuals involved lived, and the vehicles were registered—was based entirely on its insupportable conclusion that "Florida has [no] interest in its law being applied" (Pet. App. 8a) because its statute of repose did not apply to non-Florida manufacturers. See *id.* at 10a-11a. Although respondent parrots the court's reasoning (Br. in Opp. 3-4, 7 n.5), she makes no effort to defend either its conclusion or its misplaced reliance on a student law review note that does *not* address the issue presented here. See Pet. 6, 16. Thus, respondent nowhere explains the Sixth Circuit's critical holding that the Florida statute of repose applied only to Florida-based corporations (see Pet. 16), much less how such a construction could possibly be constitutional. See Pet. 17 n.8. Nor does respondent answer our argument that Florida courts

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[3] There also is no basis for respondent's related assertion (Br. in Opp. 6) that the district court disregarded *Olmstead*. In fact, the district court, noting "the demise of the traditional *lex loci delicti* rule," observed that *Olmstead* represented "the pervasive existing rule" and summarized *Olmstead* as "adopt[ing] the interests-balancing approach." Pet. App. 13a-14a.

consistently have applied the statute of repose to non-Florida manufacturers. See Pet. 14-15.[4]

In sum, Florida decisions establish that Florida has an interest in the application of its statute of repose in this case, and *Hampshire* makes clear that Michigan would respect that interest. The court of appeals' refusal to follow controlling state authority—in direct violation of this Court's decisions—therefore resulted in a decision that is contrary to the law of two states and can serve only to encourage forum shopping. Given the substantial practical importance of requiring federal courts to adhere strictly to the dictates of *Erie* in diversity cases (see Pet. 25-27), the decision below warrants further review.

II. THE COURT OF APPEALS FAILED TO ACCORD DUE DEFERENCE TO THE DISTRICT COURT'S DETERMINATION OF STATE LAW

Respondent does not take issue with our contention (Pet. 17-20) that the Sixth Circuit failed to give any deference to the district court's construction of Michigan law in this case. This Court recently granted review in *Salve Regina College* v. *Russell*, No. 89-1629, to consider whether such deference is warranted. Accordingly, it is apparent that the appropriate course is to hold this case pending the decision in *Salve Regina College*.

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[4] Unable to defend the proposition that the Florida statute of repose applied only to Florida-based manufacturers, respondent instead contends (Br. in Opp. 4 n.3) that "[u]nder Michigan's specific approach to choice of law, it is completely irrelevant whether or not Florida would apply its statute of repose in the event that the suit had been brought there." Not surprisingly, there is no support in Michigan conflicts law for this bizarre assertion, and it was not the basis for the Sixth Circuit's ruling. What is more, respondent does not bother to explain why Florida would have a *controlling* interest in applying its statute of repose in cases brought in Florida against out-of-state manufacturers but *no* interest when the identical suits were brought elsewhere.

Respondent contends (Br. in Opp. 8), however, that the issue involved here has "no connection whatsoever" with *Salve Regina College* because, in her view, different deference rules apply depending upon whether the district court resolved an "unsettled" question of state law (as, she asserts, in *Salve Regina College*) or applied "settled" principles of state law to a particular set of facts (assertedly this case). Contrary to respondent's claim, the question presented in *Salve Regina College*—"[w]hether a party is entitled to *de novo* review of a federal district judge's determination of state law in a case in which federal jurisdiction is founded upon diversity of citizenship" (89-1629 Pet. Br. i)—makes no distinction between the types of state-law issues presented for adjudication in diversity cases. Respondent also cites no case that has adopted her theory of deference, and this Court certainly has never drawn such a distinction. See Pet. 19-20. Nor does respondent explain why *this* case raises an issue of "settled" state law—a characterization plainly belied by contrasting the court of appeals' decision with the district court's ruling and the Michigan courts' post-*Olmstead* reliance on *Hampshire*.

Respondent thus is simply wrong in arguing (Br. in Opp. 10) that "this Court's decision in *Salve Regina College*, either way, will be of no benefit whatsoever" to Ford. A reaffirmation in *Salve Regina College* that deference is required would necessarily require reconsideration of the result in this case, since it is uncontested that the court of appeals gave *no* deference at all to the district court's interpretation of state law.[5]

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[5] As our *amicus* brief in *Salve Regina College* makes clear (at 2), we believe that the views of district judges in diversity cases are entitled to "considerable deference" on appeal. See also Pet. 19-20. Accordingly, there is no basis for respondent's portrayal (Br. in Opp. 5) of our position as one advocating absolute, unreviewable deference to district judges.

III. THE COURT OF APPEALS FAILED TO FOLLOW AVAILABLE STATE CERTIFICATION PROCEDURES

While not denying that certification is an efficient and valuable means of resolving significant and uncertain issues of state law (see Pet. 21-23), respondent contends (Br. in Opp. 11) that this Court's guidance on the use of certification procedures is unnecessary because the Court already has established "guidelines" for federal courts to follow: they must exercise "sound discretion." Under that standard, she asserts, it is "simply preposterous" (*ibid.*) that the court of appeals should have ordered certification in this case.

Assuming that "sound discretion" is a workable guideline, however, the Sixth Circuit hardly exercised it here. The court of appeals was confronted with a recent Michigan appellate decision directly on point, which had been cited with approval by the Michigan Supreme Court and had never been questioned. It also was confronted with an unbroken series of Florida cases demonstrating that Florida had an interest in applying—and, indeed, had routinely applied—its statute of repose to non-Florida manufacturers. To the extent that these state-court decisions left the Sixth Circuit with any doubt about state law, it should have followed the certification procedure in the appropriate state supreme court—not reach a result that was diametrically at odds with numerous state decisions and the ruling of the district court. The salutary purposes of state-law certification are especially important in this type of situation.

By completely ignoring the avenue of certification here, the Sixth Circuit stands in marked contrast to the liberal invocation of state certification procedures followed by other courts of appeals and urged by commentators. See Pet. 21-23. Indeed, this Court "do[es] not hesitate to avail [itself] of [that procedure]." *Elkins* v. *Moreno*, 435 U.S.

647, 663 n.16 (1978).[6] The Court repeatedly has encouraged lower federal courts to take advantage of available certification procedures, and numerous states have adopted such procedures. See 17A C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 4248 at 164-167 (1988). This case demonstrates, however, that encouragement alone is not enough. This Court's further guidance is required if certification is to achieve its goal of "help[ing] build a cooperative judicial federalism." *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974).

In the end, this case raises broad and important questions concerning the proper approach of the federal courts to state-law issues in diversity suits. The Sixth Circuit refused to employ *any* of the tools established by this Court for ascertaining state law—following state intermediate appellate court decisions, deferring to district court interpretations of state law, and certifying state-law issues to the state courts if the correct outcome is uncertain under existing precedent. Instead, the court below set off on its own unguided determination of state law.

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[6] The legitimacy of Ford's request for certification is not called into question because it was first raised in Ford's petition for rehearing. In *Lehman Brothers* v. *Schein*, 416 U.S. 386 (1974)—which, like this case, involved a choice-of-law question—the losing party in the court of appeals first requested certification in its rehearing petition (*id.* at 392-393) (Rehnquist, J., concurring). Nevertheless, this Court did not hesitate to vacate the judgment of the court of appeals and remand the case for consideration of certification in light of the Court's opinion.

Moreover, in this case, Ford's position on certification was perfectly logical. As explained above, *Hampshire* is on all fours with this case, was cited with approval in *Olmstead*, followed the same analytical approach as *Olmstead*, and (until the Sixth Circuit's ruling) had consistently been treated as good law in post-*Olmstead* decisions. In addition, Florida had uniformly applied its statute of repose to benefit non-Florida manufacturers. Because state law was thus clear, there was no need for certification until the court of appeals abruptly departed from prior precedent.

As a result, it issued a ruling that would not have been rendered by the state courts in Michigan or Florida and that necessarily rewards and encourages the most transparent form of forum shopping. The decision below is in direct violation of *Erie* and should not be allowed to stand.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court may wish to hold the petition pending decision in *Salve Regina College* v. *Russell*, No. 89-1629.

Respectfully submitted.

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